Negotiated Rulemaking

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Summary

Negotiated rulemaking, which is a supplement to traditional rulemaking, is a process in which representatives of federal agencies and affected parties work together in a committee to reach consensus on what can ultimately become a proposed rule. Although negotiated rulemaking is not appropriate for all regulations, advocates believe that the approach can speed rule development, reduce litigation, and generate more creative and effective regulatory solutions.

The Negotiated Rulemaking Act of 1990 established the basic statutory authority for the approach while giving agencies wide latitude in its implementation, and the Clinton Administration advocated a broader application of the approach. Agencies are permitted to use "conveners" to determine whether negotiated rulemaking is appropriate and to select participants, and to use "facilitators" to chair the negotiated rulemaking committee meetings. At the end of the process, agencies must still publish proposed and final regulations for public comment, but any proposal agreed to by the negotiating committee is not binding on the agency or other parties.

Although the Negotiated Rulemaking Act gives agencies substantial discretion as to whether the approach should be employed in rulemaking, Congress has sometimes mandated its use by rulemaking agencies and established specific procedures and time frames to follow. Studies examining the implementation of negotiated rulemaking have reached different conclusions regarding the approach's effect on rulemaking timeliness, litigation, as well as other issues. Researchers also disagree regarding how the effectiveness of negotiated rulemaking should be measured.

This report will be updated if significant developments occur (e.g., congressional action or research findings) that could affect the use of negotiated rulemaking. For information on the traditional rulemaking process, see CRS Report RL32240, *The Federal Rulemaking Process: An Overview*, by Curtis W. Copeland.

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The Administrative Procedure Act (APA) of 1946 (5 U.S.C. §551 *et seq.*) generally requires federal agencies to publish their proposed rules (also called regulations) in the *Federal Register,* to provide the public with an opportunity to comment on those proposed rules, and to publish a final rule at least 30 days before its effective date. The APA does not, however, specify how agencies are to develop their proposed rules or who should participate in that process. Consequently, agencies sometimes develop rules without discussing relevant issues with all affected interests, and there may be little or no opportunity for an informal exchange of views among affected parties or between those parties and the rulemaking agency either before or after the proposed rule is published.

Negotiated rulemaking (sometimes referred to as regulatory negotiation or "reg-neg") is a supplement to the traditional APA rulemaking process in which agency representatives and representatives of affected parties work together to develop what can ultimately become the text of a proposed rule.[1] In this approach, negotiators try to reach consensus by evaluating their priorities and making tradeoffs, with the end result being a draft rule that is mutually acceptable. Negotiated rulemaking has been encouraged (although not usually required) by both congressional and executive branch actions, and has received bipartisan support as a way to involve affected parties in rulemaking before agencies have developed their proposals. Some questions have been raised, however, regarding whether the approach actually speeds rulemaking or reduces litigation.

Development of Negotiated Rulemaking

The development of negotiated rulemaking is traceable to dissatisfaction with what some viewed as the formal, complex, and adversarial nature of traditional rulemaking procedures. For example, in 1982, administrative law expert Philip J. Harter—an early advocate of negotiated rulemaking—said a "malaise" had settled over the federal rulemaking process because of the defensive and arms-length manner in which agencies and affected parties interacted.[2] He suggested a different approach in which differences were acknowledged and resolved through face-to-face negotiations, and laid out a series of principles that could make those negotiations successful.

Also in 1982, the Administrative Conference of the United States (ACUS) recommended that agencies consider using negotiated rulemaking as a way to develop proposed rules, published criteria for determining when negotiated rulemaking was likely to be successful, and suggested specific procedures to be followed when implementing the approach.[3] For example, ACUS said agencies should use "conveners" to determine whether negotiated rulemaking is appropriate and to identify affected interests. ACUS also recommended that Congress pass legislation explicitly authorizing agencies to use negotiated rulemaking, but giving them substantial flexibility to adapt negotiation methods.

In 1983, the Federal Aviation Administration became the first federal agency to try negotiated rulemaking (regarding flight and rest time requirements for domestic airline pilots), followed by

[1] For a more complete discussion of negotiated rulemaking and relevant agency documents, see David M. Pritzker and Deborah S. Dalton, eds., *Negotiated Rulemaking Sourcebook* (Washington: Administrative Conference of the United States, 1995).

[2] Philip J. Harter, "Negotiating Regulations: A Cure for Malaise," *Georgetown Law Journal* 71 (1982), pp. 1-118.

[3] Administrative Conference of the United States, Recommendation 82-4, 1 CFR 305.82.4. The Administrative Conference was established in 1968 to provide advice regarding procedural improvements in federal programs, and was eliminated by Congress in 1995.

the Environmental Protection Agency (EPA) and the Occupational Health and Safety Administration. In 1985, ACUS recommended refinements to the procedures based on these agencies' experience with the approach.[4] For example, ACUS said that agencies sponsoring the effort should take part in the negotiations, and pointed out that negotiated rulemaking could be used at several stages of the rulemaking process.

Congressional Action

The Negotiated Rulemaking Act of 1990 (5 U.S.C. §§561-570), as amended and permanently authorized in 1996 by the Administrative Dispute Resolution Act of 1996 (110 Stat. 2870, 3873), essentially enacted the ACUS recommendations, establishing basic statutory authority and requirements for the use of the approach while giving agencies wide latitude in its implementation. The act supplements (but does not supplant) APA rulemaking procedures, and establishes a framework by which agencies are encouraged (but not required) to use negotiated rulemaking to develop proposed rules. The act established public notice requirements and procedures by which affected parties can petition for inclusion in the process, and clarified that agencies must generally comply with the Federal Advisory Committee Act in establishing and administering the negotiating committee.[5] The negotiated rulemaking committee, composed of representatives of the agency and from the various non-federal interests that would be affected by the proposed regulation, addresses areas of concern in the hope that it can reach agreement on the contents of a proposed regulation. The agency can, if it agrees, then issue the agreement as a proposed rule, and eventually as a final rule, under existing APA procedures. The expectation is that any rule drafted through negotiated rulemaking would be easier to implement and less likely to be the subject of subsequent litigation.[6]

Executive Branch Actions

In September 1993, the Clinton Administration's National Performance Review (NPR) recommended (among other things) that federal agencies increase their use of negotiated rulemaking.[7] That same month, President Clinton issued Executive Order 12866, which, in part, directed federal agencies to "explore and, where appropriate, use consensual mechanisms for developing regulations, including negotiated rulemaking."[8] President Clinton also issued a separate memorandum in September 1993 directing each agency to identify at least one rulemaking for which the agency would use negotiated rulemaking during 1994, or to explain why the use of the approach was not feasible.[9]

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[4] Administrative Conference of the United States, Recommendation 85-5, 1 CFR 305.85-5.

[5] The Federal Advisory Committee Act (codified at 5 U.S.C. App. 2) regulates the formation and operation of advisory committees used by federal agencies that are not entirely composed of full-time federal employees.

[6] Another process for early stakeholder involvement in rulemaking was established by the Small Business Regulatory Enforcement Fairness Act of 1996 (P.L. 104-121, codified at 5 U.S.C. §609). The act required the Environmental Protection Agency and the Occupational Safety and Health Administration to convene a small business advocacy review panel before publishing any proposed rule that they determine may have a significant economic impact on a substantial number of small entities. Although the panels are required to be composed of federal employees, the panel must collect the advice and recommendations of representatives of affected small entities.

[7] Vice President Al Gore, *From Red Tape to Results: Creating a Government That Works Better and Costs Less* (Sept. 1993), recommendation REG03.

[8] Executive Order 12866, "Regulatory Planning and Review," 58 *Federal Register* 51735, Oct. 4, 1993. The order was issued on Sept. 30, 1993.

[9] U.S. President (Clinton), "Negotiated Rulemaking," Sept. 30, 1993.

In May 1998, President Clinton issued another memorandum to the heads of executive branch departments and agencies intended to promote greater use of negotiated rulemaking.[10] Specifically, he designated the Regulatory Working Group (which had been established by Executive Order 12866 and was composed of the heads of agencies with significant domestic regulatory responsibilities) as an interagency committee to "facilitate and encourage agency use of negotiated rulemaking."

The Negotiated Rulemaking Process

The Negotiated Rulemaking Act permits agencies to establish a negotiated rulemaking committee if the head of the agency determines that doing so is "in the public interest." In making that determination, the act says the head of the agency must consider whether (1) a rule is needed, (2) there are a limited number of identifiable interests that will be significantly affected by the rule, (3) there is a "reasonable likelihood" that a balanced committee can be convened that will adequately represent those identifiable interests and is willing to negotiate in good faith to reach consensus on a proposed rule, (4) there is a "reasonable likelihood" that the committee will reach a consensus on the proposed rule within a fixed period of time, (5) the negotiated rulemaking process will not delay the issuance of the proposed or final rule, (6) the agency has adequate resources that it is willing to commit to the committee, and (7) the agency will use the committee's consensus as the basis of the proposed rule "to the maximum extent possible consistent with the legal obligations of the agency." The act also specifically permits the use of conveners to help the agency identify affected parties and to determine whether a committee should be established.

If the agency decides to establish a negotiated rulemaking committee, the act requires the agency to publish a notice in the *Federal Register* (and, as appropriate, relevant trade or other specialized publications) containing (among other things) a description of the subject and scope of the rule, a list of affected interests, a list of those proposed to represent those interests and the agency, and a solicitation for comments.[11] The comment period must be for at least 30 calendar days. Membership on the committee is limited to 25 members (including at least one from the sponsoring agency), unless the agency head determines that more members are needed. The agency can select (subject to the approval of the committee by consensus) an impartial "facilitator" to chair meetings and oversee the administration of the committee. The facilitator does not have to be a federal employee, but agencies are required to determine whether a person under consideration to be a convener or a facilitator has any financial or other conflict of interest.

Any agreement on a negotiated rule must be unanimous, unless the negotiated rulemaking committee agrees to other conditions. If the committee reaches consensus, it must submit a report to the sponsoring agency containing the proposed rule and any other information it deems appropriate. However, any proposal agreed to by the committee is not binding on the agency or other parties; the agency may decide not to issue a proposed rule at all or not as designed by the committee, and interest groups represented on the committee may oppose the rule that they helped craft.[12]

[10] U.S. President (Clinton), "Designation of Interagency Committees to Facilitate and Encourage Agency Use of Alternate Means of Dispute Resolution and Negotiated Rulemaking," May 1, 1998.

[11] If the agency subsequently decides not to establish a negotiated rulemaking committee, the agency is required to publish another notice in the *Federal Register* explaining why it decided not to go forward. A copy of the notice must be sent to each person who applied for or nominated another person for membership on the committee.

[12] See *USA Group Loan Services, Inc. v. Riley*, 82 F.3d 708 (7th Cir. 1996).

The committee terminates no later than promulgation of the final rule. An agency may pay reasonable travel and *per diem* expenses, and reasonable compensation to negotiating committee members under certain conditions. Agency procedural actions related to establishing, assisting, or terminating the committee are not subject to judicial review, but any judicial review available regarding the rule resulting from negotiated rulemaking is unaffected.

Congressional Mandates to Negotiate

Although the Negotiated Rulemaking Act gives agencies substantial discretion as to whether the approach should be employed in rulemaking, Congress has sometimes mandated its use by rulemaking agencies and established specific procedures and time frames to follow. For example:

- Section 7212 of the Intelligence Reform and Terrorism Prevention Act of 2004 (P.L. 108-458) required the Secretary of Transportation to use negotiated rulemaking in developing regulations establishing minimum standards for drivers licenses or personal identification cards.
- Section 222 of the "Consolidated Appropriations Act, 2004" (P.L. 108-199) required the Secretary of Housing and Urban Development to "conduct negotiated rulemaking with representatives from interested parties for purposes of any changes to the formula governing the Public Housing Operating Fund."
- Section 1901(b)(3)(A) of the No Child Left Behind Act (P.L. 107-110) required the Secretary of Education to "establish a negotiated rulemaking process on, at a minimum, standards and assessments." The section went on the stipulate that those involved in the process should be selected from among those that provided advice and recommendations on how the title should be carried out, and said that the process should follow the process outlined in the Negotiated Rulemaking Act (except that it should not be subject to the Federal Advisory Committee Act).
- Section 1125(a)(5) of the No Child Left Behind Act required the Secretary of Education to establish a negotiated rulemaking committee to prepare, for schools funded by the Bureau of Indian Affairs, a catalog of the condition of school facilities, a school replacement and new construction report, and a renovation repairs report. The act specified the contents of each report and required that it be submitted to particular congressional committees within 24 months.
- Section 106(b)(2) of the Native American Housing Assistance and Self-Determination Act of 1996 (P.L. 104-330) required that all regulations under the act must be issued according to negotiated rulemaking procedures, and required that the negotiating committee be composed only of representatives of the federal government and "geographically diverse small, medium, and large Indian tribes." Section 6 of the Native American Housing Assistance and Self-Determination Reauthorization Act of 2002 (P.L. 107-292) required negotiated rulemaking for any rules issued pursuant to amendments to the original act.
- Section 490D(b)(3) of the Higher Education Amendments of 1998 (P.L. 105-244) required that negotiated rulemaking must be used for all subsequent regulations pertaining to the act's title on student assistance "unless the Secretary determines that applying such a requirement with respect to given regulations is impracticable, unnecessary, or contrary to the public interest." The Secretary is required to publish such a determination in the *Federal Register* at the same time as the proposed rule.

Several bills that have been introduced in the 110th Congress would, if enacted, also require the use of negotiated rulemaking. For example, the Indian Health Care Improvement Act Amendments of 2007 and 2008 (H.R. 1328 and S. 1200) would (among other things) revise the Indian Catastrophic Health Emergency Fund (CHEF) requirements and require the Secretary of HHS to use negotiated rulemaking for the promulgation of CHEF regulations.

Evaluations of Negotiated Rulemaking

According to ACUS and other advocates of the approach, negotiated rulemaking can have a number of beneficial effects, including the following:

- reduced time, money and effort expended on developing and enforcing rules,
- earlier implementation of associated rules,
- better agency understanding of regulated parties' concerns,
- greater understanding by regulated parties of their responsibilities and higher compliance rates,
- more creative and effective regulatory solutions,
- less litigation associated with the rule, and
- more cooperative relationships between the agency and other parties.

ACUS and others have also identified a number of disadvantages of negotiated rulemaking.

- ACUS noted that the approach can be more resource-intensive than traditional rulemaking, at least in the short term, and does not work when the number of affected interests is too large (e.g., more than 25 negotiators).
- One author said that the approach has been used only rarely (reportedly for less than one-tenth of 1% of all rules), and he said only a few of those rules were considered "major" or "significant."[13] The author noted that the Negotiated Rulemaking Act instructs agencies to select rules based on their likelihood of consensus, not their importance.
- Another author said that negotiated rulemaking has been used sparingly "for the good reason that it represents a corporatist abdication of public authority to private interests," and that even when used it only results in a proposed rule that is subject to the same procedural requirements as rules developed conventionally.[14]
- Another commenter asserted that negotiated rulemaking does not work when developing regulations based on broad statutes, and may "inadvertently perpetuate the problem (of statutory vagueness) by facilitating efforts to shift blame for controversial public policies from legislators to bureaucrats."[15]

[13] Cary Coglianese, "Is Consensus an Appropriate Basis for Regulatory Policy?," in Eric Orts and Kurt Deketelaere, eds., *Environmental Contracts: Comparative Approaches to Regulatory Innovation in the United States and Europe* (Kluwer Law International, 2001), pp. 93-113.

[14] William F. West, "Formal Procedures, Informal Processes, Accountability, and Responsiveness in Bureaucratic Policy Making: An Institutional Policy Analysis," *Public Administration Review* 64 (Jan/Feb 2004), pp. 66-80.

[15] Juliet A. Williams, "The Delegation Dilemma: Negotiated Rulemaking in Perspective," *Policy Studies Review* 17 (spring 2000), pp. 125-146.

- Yet another study concluded that "the principles, theory, and practice of negotiated rulemaking subtly subvert the basic, underlying concepts of American administrative law—an agency's pursuit of the public interest through law and reasoned decisionmaking. In its place, negotiated rulemaking would establish privately bargained interests as the source of putative public law."[16]

Nevertheless, a number of observers continue to view negotiated rulemaking favorably, with one regulatory expert describing it as offering the public "the most direct and influential role in rulemaking of any reform of the process ever devised."[17]

Empirical Studies

Studies of how negotiated rulemaking works in practice have reached substantially different conclusions about its effects and prospects.

- In 1990, eight agencies that had convened negotiation committees reportedly told ACUS that even though full consensus was not always possible, the information developed through the process contributed substantially to the rule that was produced.[18]
- A 1992 study of four EPA negotiated rulemaking efforts indicated that the approach reduced the time needed to develop rules (particularly during the period between proposed and final rulemaking).[19] However, another study five years later examining more EPA negotiations reached the opposite conclusion, finding that conventional rules and negotiated rules took about the same amount of time and that negotiated rules were more likely to be challenged in court.[20] Similarly, a 1999 study also concluded that negotiated rulemaking had "no discernible effect" on the amount of time between proposed and final rulemaking.[21]
- Another study indicated that negotiated rulemaking can improve participants' perception of the final rule and of the overall rulemaking process.[22] Participants in negotiated rulemaking were reportedly more pleased with the quality of the information the process generated than those who filed comments on conventional rules, and more likely to view their participation as having an effect on the final rule. The study also indicated, however, that negotiated rulemaking

[16] William Funk, "Bargaining Toward the New Millennium: Regulatory Negotiation and the Subversion of the Public Interest," *Duke Law Journal* 46 (1997), pp. 1351-1388.

[17] Cornelius M. Kerwin, *Rulemaking: How Government Agencies Write Law and Make Policy*, 2nd ed. (Washington: CQ Press, 1999), p. 179.

[18] David Pritzer and Deborah Dalton, eds., "Agency Experience with Negotiated Rulemaking," in *Negotiated Rulemaking Sourcebook* (Washington: Administrative Conference of the United States, 1990), pp. 327-344.

[19] Cornelius Kerwin and Scott Furlong, "Time and Rulemaking: An Empirical Test of Theory," *Journal of Public Administration Research and Theory* 2 (1992), pp.113-138.

[20] Cary Coglianese, "Assessing Consensus: The Promise and Performance of Negotiated Rulemaking," *Duke Law Journal* 46 (1997), pp. 1255-1349.

[21] Steven J. Balla and John R. Wright, "Consensual Rulemaking and the Time it Takes to Develop Rules," presented at the Fifth National Public Management Research Conference, College Station, TX, Dec. 3-4, 1999.

[22] Laura I. Langbein and Cornelius M. Kerwin, "Regulatory Negotiation versus Conventional Rulemaking: Claims, Counterclaims, and Empirical Evidence," *Journal of Public Administration Research and Theory* 10 (2000), pp. 599-632. See also Jody Freeman and Laura I. Langbein, "Regulatory Negotiation and the Legitimacy Benefit," *New York University Environmental Law Journal* 9 (2000), pp. 60-151.

- imposes substantial costs on participants, who are required to attend multiple meetings and interact with other stakeholders for long periods of time.

Substantial disagreements exist regarding how the effectiveness of negotiated rulemaking should be measured (e.g., timeliness and the amount of litigation).[23] Most researchers agree, however, that the approach is not appropriate for all rules, and that more research is needed to determine its effects on rules, the rulemaking process, and participants in that process.

Author Information

Curtis W. Copeland
Specialist in American National Government

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[23] Philip J. Harter, "Assessing the Assessors: The Actual Performance of Negotiated Rulemaking," *New York University Environmental Law Journal* 9 (2000), pp. 32-59; and Cary Coglianese, "Assessing the Advocacy of Negotiated Rulemaking: A Response to Philip Harter," *New York University Environmental Law Journal* 9 (2001), pp. 386-447.